

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-243

July 10, 2000

BANGOR HYDRO-ELECTRIC COMPANY
Request for Advisory Ruling Regarding
Exercise of Eminent Domain to Construct
345 kV Transmission Lines

ADVISORY OPINION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Bangor Hydro-Electric Company (BHE) seeks an advisory ruling that affirms that BHE will be qualified to exercise the right of eminent domain, pursuant to 35-A M.R.S.A. § 3136(1), to acquire any land or easements necessary to construct a 345 kV transmission line from the New Brunswick border in Woodland, Maine to the Maine Electric Power Company (MEPCO) substation in Orrington, Maine. For BHE to construct the New Brunswick-Orrington transmission line, BHE will require a certificate of public convenience and necessity from this Commission. Once a certificate is granted, because the transmission line will constitute “transmission and distribution plant” within 35-A M.R.S.A. § 102(20-A), the owner/operator of the line will be a transmission and distribution (T&D) utility. As a T&D utility, the owner/operator will possess the legal authority to exercise eminent domain as described in 35-A M.R.S.A. § 3136.

II. BACKGROUND

BHE holds certain rights and interests to develop a 345 kV transmission line that will interconnect with the New Brunswick Power Commission electric system at the Maine-New Brunswick border near Woodland, Maine and the existing MEPCO line at the MEPCO substation in Orrington, Maine. Specifically, BHE owns certain rights of way associated with the 345 kV line as well as certain permits and has developed extensive information regarding planning, permitting, design and construction of the proposed 345 kV line. Although a portion of the 345 kV line will be constructed within BHE’s existing authorized transmission and distribution (T&D) service area, the majority of the 345 kV line will be located outside its current T&D authorized service area. Some of the areas outside BHE’s service area are currently served by or authorized to be served by another T&D utility. BHE’s proposed transmission corridor traverses 84 miles through Washington, Hancock and Penobscot Counties from the New Brunswick border to Orrington. The 345 kV line will be operated solely to provide high voltage transmission service to and between existing transmission and distribution systems. Because the MEPCO line from Orient to Orrington already connects New Brunswick to the New England Grid, BHE’s proposed Woodland to Orrington line has been referred to as the second New Brunswick tie-line.

BHE seeks to renew permits obtained from both the Department of Environmental Protection (DEP) and the Land Use Regulatory Commission (LURC) to build the second New Brunswick transmission tie-line. According to parties in the DEP and LURC proceedings, BHE must show sufficient “right, title or interest” to have standing to request such permits. BHE asserts before the DEP and the LURC that its right to acquire land by eminent domain provides BHE with the necessary, right, title and interest to obtain the environmental and land use permits. DEP instructed BHE to seek an advisory ruling from the Commission on the question of BHE’s authority to use eminent domain to build the second New Brunswick tie-line. Accordingly, on March 13, 2000, BHE filed this request for advisory ruling. Because of DEP’s request, on April 27, 2000, we accepted the General Counsel’s recommendation and decided to issue an advisory ruling. See Chapter 110, Part 6 of our Rules.

We invited Champion International Corporation (Champion) and the Natural Resources Council of Maine (NRCM) to respond to BHE’s request for advisory ruling because of their participation in the DEP and LURC proceedings. A significant portion of the proposed BHE tie-line will be built on forest lands currently owned by Champion in Penobscot, Hancock and Washington counties. Champion states that BHE relies on its power of eminent domain with respect to Champion’s lands, because Champion is unwilling to voluntarily transfer sufficient right, title or interest to BHE. Champion states that it is not opposed in principle to a second 345 kV transmission corridor to New Brunswick, but Champion does oppose location of a new transmission line corridor which is outside the Stud Mill Road and existing gas pipeline corridor. BHE proposes a transmission corridor that is sometimes but not always adjacent to the Stud Mill Road and the pipeline corridor. The proposed transmission corridor is generally near the Stud Mill Road, but diverges in some places by as much as 1 to 1.5 miles.

Before DEP, the NRCM objects to BHE building a second electric transmission corridor from New Brunswick to Orrington. The NRCM suggests that a second electric transmission line between Orrington and the New Brunswick border should be built by expanding the existing MEPCO transmission line corridor. In the NRCM’s view, a second electric transmission line either in the proposed BHE location or within the gas pipeline corridor as suggested by Champion, creates unnecessary environmental and aesthetic degradation.

As part of its generation asset divestiture required by electric restructuring, BHE agreed to sell to PPL Global, Inc. BHE’s rights to develop and utilize the second 345 kV tie-line with New Brunswick. The second 345 KV line is the subject of a Memorandum of Understanding (MOU) between BHE and Penobscot Hydro, LLC (a wholly owned subsidiary of PPL Global, Inc.) dated January 5, 1999, which is incorporated as part of the Asset Purchase Agreement dated September 25, 1998 between BHE and PP&L Global, Inc. By Order dated February 3, 1999, the Commission authorized the sale and transfer of BHE’s generation assets to Penobscot Hydro, LLC pursuant to the September 25, 1998 Asset Purchase Agreement.

Champion and the NRCM assert that Penobscot Hydro should be viewed as the real party in interest and that the Commission should defer deciding the advisory ruling until the ownership issues are resolved, apparently because, they assert, the transmission line will not be owned by a T&D utility if Penobscot Hydro becomes the owner.

BHE asserts that, pursuant to the MOU, BHE and Penobscot Hydro each have certain rights to retain or acquire some or all of the interest and ownership rights in the 345 kV line. BHE further maintains, however, that the MOU should not be an issue with regard to the advisory ruling, and the rights or interest received by Penobscot Hydro as part of the MOU should not enter into the Commission's analysis in the advisory ruling because Bangor Hydro is the applicant to the Department of Environmental Protection for the permit for site location for the 345 kV line.

BHE seeks advice from the Commission on the meaning of "authorized to do public utility business" within the T&D eminent domain authority (35-A M.R.S.A. § 3136(1)),¹ specifically whether the phrase refers to 1) a utility's commission-approved service territory; or 2) the area in which the utility is authorized to do business by its corporate charter. Champion and the NRCM appear to agree with BHE that Commission advice is needed to clarify the "authorized to do public utility business" clause, but they also believe that additional questions must be addressed in deciding whether BHE or the real party-in-interest possesses eminent domain rights as to the proposed transmission line corridor. Champion and the NRCM assert that eminent domain is restricted to Commission-authorized service territory, that most of the proposed transmission line corridor is outside of BHE's existing service territory (BHE acknowledges this fact), and that therefore BHE lacks eminent domain authority for the transmission line. Champion and the NRCM also assert that, because part of the corridor for which BHE lacks service territory authority is presently served by another T&D utility, BHE must seek and obtain Commission approval pursuant to 35-A M.R.S.A. § 2102(1) before BHE may serve in the first T&D utility's service territory. The NRCM argues that the Commission may not authorize BHE to serve within the unorganized territory portion of BHE's proposed corridor because 35-A M.R.S.A. § 2102(1) permits the Commission to authorize a second utility only in organized municipalities.

Champion and the NRCM also argue that BHE's corporate charter does not authorize the corporation to serve within unorganized territory, which also restricts the

¹ Section 3136(1) provides that:

Any transmission and distribution utility may take and hold by right of eminent domain lands and easements necessary for the proper location of its transmission lines that are designed to carry voltages of 5000 volts or more and of necessary appurtenances, located within the territory in which the utility is authorized to do public utility business . . .

Commission's authority to permit BHE to operate within unorganized territory. Champion and the NRCM also find significance in the fact that BHE is a general corporate law-created utility rather than a legislatively-chartered corporate utility. In their view, the Commission's legal authority to expand BHE's authorized service territory is more restricted as to general law utilities.

III. ADVISORY RULING

By Maine law, a transmission and distribution utility is authorized to exercise eminent domain power to construct transmission lines of 5000 volts or more. 35-A M.R.S.A. § 3136(1). The Commission must approve the location of the T&D's exercise of eminent domain. 35-A M.R.S.A. § 3136(4). The transmission lines are to be "located within the territory in which the utility is authorized to do public utility business... ." 35-A M.R.S.A. § 3136(1).

BHE and the interested parties argue that the question concerning BHE's eminent domain authority is answered by resolving issues about Commission-authorized service territory, the Commission's authority to permit second utilities to serve within the first utility's service territory, and BHE's corporate authorization to serve within unorganized territory. Those issues, however, will not be determinative in any proceeding BHE will bring to the PUC for authority to build the second tie-line or for approval to exercise eminent domain to acquire property interests necessary to build the transmission tie-line.

Issues raised concerning BHE's corporate authority to own or operate the second Maine-New Brunswick transmission line are resolved by the 1971 amendments to its Articles of Incorporation. In 1971, BHE's corporate purposes as stated in the Articles of Incorporation, were amended by adding the following language to the named locations for the corporation to operate its gas or electricity business:

...and at such other location or locations as from time to time
authorized under the laws of the State of Maine.

This language removes any ambiguity about BHE's corporate authorization to serve within unorganized territory.² As we will discuss below, the Commission can authorize BHE, under the laws of the State of Maine, Title 35-A, to operate in unorganized territory.

² Questions concerning corporate authority for a utility to perform services for which it seeks Commission authority do not typically arise. Because we find that BHE clearly possesses the necessary corporate authority to build or operate the second tie line, we do not need to consider when or even whether the Commission could overcome a lack of corporate authority.

Before a T&D utility may construct a transmission line of 100 kilovolts or more, the T&D utility must obtain a certificate of public convenience and necessity from the Commission. 35-A M.R.S.A. § 3132(2). Once the Commission issues a certificate authorizing a T&D utility to construct such a transmission line, the T&D utility is authorized to do business in the location of the newly certificated transmission line.³ Thus, for a transmission line of 100 kilovolts or more, including the second New Brunswick tie-line, service territory does not arise as an issue but is granted if the Commission finds public need for the line and that the applicant possesses the necessary financial and technical ability to construct and operate the line, or in other words, grants the certificate to build the line.

Because the second New Brunswick tie-line will require a certificate of public convenience and necessity from the Commission, the Commission would not entertain a Section 3136 request for approval to exercise eminent domain to build the second New Brunswick tie-line until after the Commission had issued a certificate pursuant to Section 3132 which would authorize the construction of the transmission line. See Central Maine Power Company (Request to Construct a Transmission Line of 100 or more kilovolts to connect with Rumford Power Associates Generating Facility), Docket No. 98-863 (March 12, 1999) (Certificate of Public Convenience and Necessity issued before addressing eminent domain issues). Once a certificate of public convenience and necessity is issued, however, it is clear that the T&D utility authorized to construct the transmission line will possess eminent domain authority to acquire the property interests necessary to build the transmission line (subject to approval of location of any taking by the Commission).

It should also be pointed out that, contrary to some of the statements made by Champion and the NRCM, if the Commission grants a certificate of public convenience and necessity to construct the second New Brunswick tie-line, the entity that obtains the certificate will be a T&D utility by definition. It is impossible under Maine law at the present time for the owner or operator of the transmission line to be a non-utility. The Commission emphasized this fact in our order approving the sale of BHE's generation assets because, if Penobscot Hydro LLC, the subsidiary of PPL Global, becomes the owner of the second transmission line, Penobscot Hydro becomes a T&D utility, prohibited from owning the generation assets which Penobscot Hydro had just agreed to obtain.⁴ Thus, we agree with BHE that the question of whether BHE seeks the certificate and constructs the line, or transfers its interest to another entity that will seek a certificate and construct the line, does not matter to our analysis of the eminent domain authority that will be obtained by the certificate holder.

³35-A M.R.S.A. § 3132(4) and (6) permits a utility to seek a certificate by generally describing the location of a transmission line but without identifying a specific route or route option for the proposed transmission line.

⁴ For the MEPCO transmission line, Penobscot Hydro LLC obtained the transmission capacity rights while BHE retained ownership of the line itself.

The second utility issue, that Champion and NRCM assert arises because Eastern Maine Electric Cooperative (EMEC) is already authorized to serve in some of the area BHE proposes to build the tie-line, also will not work to impede BHE's ability to seek or obtain a certificate.

First, effective March 1, 2000, the date of electric restructuring, section 2102(2) may exempt transmission facilities such as the second New Brunswick tie-line from the section 2102(1), second utility authorization requirement. The last sentence of 35-A M.R.S.A. § 2102(2) provides that:

Approval is not required for a transmission and distribution utility to distribute electricity to any other transmission and distribution utility.

If the last sentence refers to the physical distribution of the electricity onto a contiguous T&D system, the second tie-line is exempt from all second utility authorization requirements.

Even if we accept that the last sentence of section 2102(2) is ambiguous and does not exempt the second tie-line from all second utility authorizations, second utility authorization either will be irrelevant or necessarily granted in a second tie-line certificate case. The second Maine-New Brunswick tie-line will have no impact on the T&D service EMEC provides its customers, and will not serve any end users of electricity. Even if the second tie-line were found to constitute second utility service in EMEC's territory, the standard to grant second utility authority pursuant to section 2102(1) would necessarily be met if the Commission found that the section 3132 certificate standard had been met.

To summarize, BHE or any owner and builder of a second transmission tie-line to New Brunswick will be a transmission and distribution utility under Maine law and possess rights to exercise eminent domain authority, and therefore possess the right, title or interest necessary to apply for a site location permit. Of course, the T&D utility can exercise eminent domain only after obtaining a certificate of public convenience and necessity from the Commission to build the line and then receiving Commission approval as to the location of the property that the T&D utility will take by eminent domain. The service territory issues raised by Champion and NRCM, however, will be largely irrelevant to the Commission proceedings.

We presume that our answer that a second tie-line certificate holder will be a T&D utility with eminent domain rights, subject to the conditions within Title 35-A, provides BHE the necessary standing to seek a DEP permit and therefore provides the advice sought by BHE (and the DEP). We do not interpret BHE's request as seeking advice on the question of whether a PUC certificate or DEP permit should be sought first. We note that the Site Location of Development statute specifically requires site location permits to be obtained before any land is actually acquired by eminent domain. 38 M.R.S.A. § 487-A(3). This requirement forces the Commission, when deciding

eminent domain approval, to defer environmental issues to DEP, because the Board will have addressed these matters. 35-A M.R.S.A. § 3136(4).

We offer some additional comments because, from our review of the filings in this matter and before the DEP, it would appear that the need for Commission advice arose because of confusion caused by electric restructuring. Generation-related businesses are no longer public utilities. BHE included its second tie-line property interests in its sale of its generation-related assets, because a second interconnection between the New Brunswick electric system and the New England electric grid primarily will serve to bring additional generation into New England rather than provide transmission reliability. However, by Maine law, the line will be utility property and the owner/operator will be subject to utility obligations by both federal and state law.

As transmission property, the Federal Energy Regulatory Commission (FERC) will set rates for transmission service along the line. Even if the Commission imposes conditions in the certificate process to insulate retail ratepayers from the costs and revenues from the line, or if FERC permits market-based rates as if the line were a “merchant” transmission project, by Maine law the line will be T&D utility property. And T&D utilities possess eminent domain authority. There may be valid policy arguments that a transmission line like the second New Brunswick tie-line should be treated like generation non-utility property and not deserving of eminent domain authority in the restructured electric environment. Such arguments, however, must be made to the Legislature.⁵ Title 35-A is not currently ambiguous; the second New Brunswick tie-line will be utility property and as such, the owner/operator of such property will be granted eminent domain authority.

Dated at Augusta, Maine, this 10th day of July, 2000.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

⁵There are also valid policy arguments that such transmission lines are necessary to the reliability of the grid and the successful operation of a competitive generation market, and therefore are worthy of eminent domain authority.